IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1861

MIKE YUROSEK & SONS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and BUTCHERS UNION LOCAL 193 OF THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner Mike Yurosek & Sons, Inc. respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 22, 1979.

Opinions Below.

The opinion of the Court of Appeals, Appendix B, p. 3, has not yet been reported in the official reports. It has been reported unofficially at 100 L.R.R.M. 2721. The opinions of the National Labor Relations Board in this case are published at 227

N.L.R.B. 1936 (1977) and 225 N.L.R.B. 148 (1976), and are reprinted in Appendix C, p. 7, and Appendix D, p. 21, respectively.

Jurisdiction.

The opinion of the Court of Appeals for the Ninth Circuit was entered on January 22, 1979. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 3, 1979. On May 25, 1979 the Ninth Circuit entered an order staying issuance of its mandate pending this Court's disposition of this petition, conditioned on the filing of the petition no later than June 14, 1979. Because a stay has been entered the final judgment of the court has not yet been issued. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Question Presented.

Are threats of deportation preceding a National Labor Relations Board election attributable to the petitioning union, and thereby destructive of employee freedom of choice guaranteed by Section 9(a) of the National Labor Relations Act, as amended, when the threats are made by members of the union's volunteer organizing committee composed of employees at the plant and that committee is the union's only in-plant presence?

Statutes Involved.

The statutory provisions involved are Sections 8(a)(1) and (5), 9(a) and (c)(1) and 2(13) of the National Labor Relations Act, as amended, 29 U.S.C. §§158(a)(1) and (5), 29 U.S.C. §§159(a) and (c)(1) and 29 U.S.C. §152(13). These are set forth in full in Appendix A, p. 1.

Statement of the Case.

Based on a request by Butchers Union Local 193 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter called the "Union"), the National Labor Relations Board (hereinafter called the "Board") conducted a representation election on May 21, 1975 in a unit of packing shed workers employed by Mike Yurosek & Sons, Inc. (hereinafter called the "Company") in California's San Joaquin Valley. The Union won the election by a vote of 132 to 97 with 28 ballots challenged and uncounted.

The Company filed timely objections, only one of which is now pertinent, to conduct affecting the results of the election. This conduct consisted of threats to a group of at least 10 eligible voters "to the effect that if the Union did not win the election Immigration authorities would come and deport those Mexican aliens who were illegally in the country." Appendix D, p. 23, Tr. 126, 127, 146, 147.[1] These threats were made a week or two before the election to employees in a work force of which the majority spoke only Spanish.

Lupe Villalobos and Maria Papion uttered the threats. They were members of a six person volunteer committee of the Company's employees responsible for organizing for the Union inside the plant. This committee was the Union's only in-plant contact with employees, for there were no professional organizers in the plant. All the members of the in-plant organizing committee were bilingual. In contrast to the majority of the

[1] "Tr" followed by one or more numbers refers to pages of the Reporter's Transcript of the hearing on objections, reproduced in Volumes II and III of the Transcript of Record filed in the Court of Appeals.

work force who spoke only Spanish, the Union officials engaged in the pre-election campaign did not speak Spanish. Tr 127, 128, 157, 232, 254-55, 276, 277, 281-82, 289, 304, 319.

Villalobos and Papion were among the members of the committee who initially went to the Union to seek representation for the Company's employees. Tr 299, 343, 352, 384. Various committee members, including Papion, occasionally telephoned the Union's office to obtain information when they could not answer employees' questions and then returned to the employees with the response. Tr 302, 353-54. A Union official at one meeting outside the plant told employees that they should bring their questions to committee member Rocha who did not occupy any special position on the committee but was merely one of the members. Tr 122, 124, 340-41. The members of the in-plant organizing committee met together during the campaign, and the Union instructed them on the ground rules of campaigning and told them "what [they] were supposed to do, [and] not supposed to do." Tr 246-47, 304, 354. In short, with the knowledge and support of the Union the committee, including Villalobos and Papion, was the only representative of the Union inside the plant and spearheaded the campaign on the Union's behalf.

The Board rejected the Company's contention that threats by the Union's in-plant organizing committee members must be attributed to the Union, stating that service as members of the in-plant organizing committee did not make Villalobos and Papion the Union's agents in threatening fellow employees. Appendix D, p. 27. Finding no merit to the Company's alternative argument, not pressed here, that the election should be

set aside even if the threats were not attributable to the Union, the Board certified the Union as the employees' collective bargaining representative.

The Company thereafter refused to bargain with the Union in order to challenge the Board's certification. Acting on the Union's charge that the Company thereby violated Section 8(a)(5), and derivatively Section 8(a)(1), of the National Labor Relations Act, as amended (hereinafter called the "Act"), 29 U.S.C. §§158(a)(1) and (5), the Board ordered the Company to bargain with the Union. Appendix C, p. 7. The Board then petitioned the Court of Appeals under Section 10(e) of the Act, 29 U.S.C. §160(e), for enforcement of its order. Concluding that there were statements made by some employees which, if attributable to the Union, would have created an atmosphere sufficient to chill freedom of choice, the Ninth Circuit nonetheless granted the Board's petition for enforcement because the statements in question were not made or adopted by the Union or linked directly to the Union or its agents. Appendix B, p. 3.

The court referred in its opinion to 1) a conflicting rumor to the effect that Immigration would be avoided by defeating the Union, 2) testimony that two Union members and a member of the in-plant organizing committee denied that Immigration would appear if the Union lost, and 3) testimony that a Union officer denied that the Union intended to expose illegal aliens. Appendix B, p. 4. With reference to the same testimony the Board also had noted that "substantial efforts were made by [other volunteers who assisted in the organizational campaign] to disabuse employees of the idea that the Union would call the Immigration authorities if it lost the election." Appendix D, p. 28. However,

the record discloses that the denials and assurances were directed to the question of whether the Union would give illegal aliens equal rights if it *won* the election and a contract was signed, not to the question of whether Immigration would be called if the Union *lost* the election. Tr 280-81, 306-07, 370, 382. This is evident even from the Board's recitation of the testimony. For example, the Union official said the employees' legal status "did not matter *if they belonged to the Union*." Appendix D, p. 25. Similarly, the Union members employed by other companies who worked in the campaign responded to questions from employees about "what would happen with illegal aliens *if the Union got in*." Appendix D, pp. 25-26.

With respect to the conflicting rumor, which was described as a rumor that "if the Union came in, the Immigration would come in," Appendix D, p. 27, Tr 370, the witness said nothing about the Company which presumably would have been the source of such a "conflicting rumor." Thus, it appears that the rumor the witness sought to quell was that the Union did not want to represent illegal aliens and would call Immigration after it had been voted in. Once again, therefore, the assurance that this rumor was unfounded was not responsive to, and did not contradict, the threats that Immigration would be called if the Union lost.

In any event, the discrepancy between the Board's summary of this testimony and the court's restatement of that summary, on the one hand, and the Board's recitation of the testimony itself and the above summary of the record, on the other hand, is not material to the question presented here. The Board

relied on this testimony to demonstrate that the impact of threats by individuals whose remarks it had found not attributable to the Union had been diminished by statements of other third parties, and thus the atmosphere remained conducive to the expression of employee free choice in the election despite the threats. Appendix D, p. 28. This was in response to the Company's alternative argument that even if not attributable to the Union the threats, viewed as misconduct by third parties, created an atmosphere of such fear and coercion as to require that the election be set aside. No question pertaining to third party misconduct has been presented in this Court. Only the question of attribution remains, and this testimony is not material to that question. What is material is the Board's conclusion that the record does not support a finding that the Union disavowed the threats. Appendix D, p. 28.

Reasons for Granting the Writ.

Certiorari should be granted in this case for two reasons. First, the decision of the Ninth Circuit conflicts in principle with decisions of the Fourth and Seventh Circuits on the issue of attribution of pre-election threats to a petitioning labor union. This is a crucial issue because a threat attributed to a petitioning union will necessitate that the election be set aside if the threat is evaluated as having had "a probable effect upon the employees' actions at the polls." *NLRB v. Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir. 1965). However, if the threat is not attributed to the union the election will be set aside only if the threat offends a more rigorous standard requiring a resultant "atmosphere of fear of reprisal such as to render a free expression of choice impossible." *NLRB v. Sauk Valley Manufacturing Co.*, 486 F.2d 1127, 1132 n.5 (9th Cir. 1973) *quoting Manning, Maxwell & Moore, Inc. v. NLRB*, 324 F.2d 857, 858 (5th Cir. 1963).

Secondly, the question presented is of growing importance as the number of illegal aliens in the work force increases. By sanctioning predictable use of pre-election threats of deportation in plants which employ aliens the Ninth Circuit is endangering employee freedom of choice in a significant number of Board elections.

1. The Decision Below Conflicts in Principle With the Decisions of Other Courts of Appeal.

The Ninth Circuit's decision in this case conflicts in principle with decisions of the Fourth and Seventh Circuits in *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239 (4th Cir. 1976), *setting aside the election in International Ladies' Garment Workers' Union*, 214 N.L.R.B. 706 (1974), and *NLRB v. Urban Telephone Corp.*, 499 F.2d 239 (7th Cir. 1974), *denying enforcement of* 199 N.L.R.B. 1035 (1972). In the instant case the Ninth Circuit refused to attribute to the Union threats by members of its volunteer in-plant organizing committee because the threats were not "made or adopted by the union." Appendix B, p. 5. In the Ninth Circuit's view the threats could be attributed to the Union only if there were sufficient evidence "to link those statements directly to the union or its agents." Appendix B, p. 5. Thus, in the Ninth Circuit the critical inquiry for attribution of pre-election threats is whether the threats are expressly made or adopted by a union or made by an agent employed by the union.

The Ninth Circuit's standard differs from the test adopted by the Fourth Circuit in *NLRB v. Georgetown Dress Corp., supra.* There the court held that pre-election threats by members of a union's in-plant organizing committee were attributable to the union although not made or adopted by the union. The salient facts in *Georgetown Dress* are indistinguishable from those in the instant case. The volunteer in-plant organizing committee in both cases was the union's only contact with the employees, and the union never effectively disavowed the threats.

In finding that the threats were attributable to the union, the Fourth Circuit first stated that the determination of an agency relationship under the Act is governed by the liberal standard established by Section 2(13), 29 U.S.C. §152 (13), so that "the question of whether specific acts performed were actually authorized or subsequently ratified shall not be controlling." 537 F.2d at 1244 *quoting* Section 2(13).

The court in *Georgetown Dress* next noted that under Section 16 of the Second Restatement of Agency a principal need not pay another person in order to create an agency relationship, and thus the fact that in-plant organizing committee members were volunteers was irrelevant to a determination of attribution. Relying on the fact that the organizing committee members were the union's only in-plant contact with the employees, it found that the committee members were agents of the union. The court stated that in this context the proper test for attribution is whether the threats were not "clearly inappropriate to or unforeseeable in the accomplishment of the authorized result." 537 F.2d at 1244 *quoting* RESTATEMENT (SECOND) OF AGENCY §231, Comment (a) (1958). The Fourth Circuit concluded that although never expressly authorized or adopted by the union the threats nonetheless were attributable to the union under the principle of apparent authority.

In *NLRB v. Urban Telephone Corp., supra,* the Seventh Circuit adopted a standard which closely parallels the Fourth Circuit's *Georgetown Dress* test and which conflicts in principle with the Ninth Circuit's approach in the instant case. In *Urban Telephone* the court held that pre-election threats by one of the union's in-plant "contact men" were attributable to the union although it never authorized or adopted those threats. The "contact men," employees of Urban Telephone, volunteered to serve as in-plant liaisons between the employees and the union. As in *Georgetown Dress* the Seventh Circuit noted first that a determination of agency under the Act is governed by the liberal standard of Section 2(13). The court concluded that the proper question was not purely one of agency

but whether the "contact man's" "conduct is attributable to the union." 499 F.2d at 244. It held that the conduct was attributable to the union because there was a close relationship between the employee and the union, and the union failed to repudiate the employee's threats. *Id.*

In contrast to the standards utilized by the Fourth and Seventh Circuits, the Ninth Circuit's standard in the instant case is inappropriate for several reasons.

First, a requirement that pre-election threats be made expressly or adopted by a union before they can be attributed to the union is inconsistent with the liberal standard for determining agency under Section 2(13) of the Act. Both the Fourth and Seventh Circuits properly recognized that under Section 2(13) a union need not expressly authorize or ratify the threat in question; that is, there need not be a direct link between the threat and the union in order for the union to be held responsible for the threat in the context of an evaluation of the fairness of an election.

Secondly, to the extent that the Ninth Circuit's decision precludes attribution to the union of threats by anyone except persons on the union's payroll it is inconsistent with Section 16 of the Second Restatement of Agency.

Thirdly, the Ninth Circuit's decision ignores the simple reality that members of an employee organizing committee which is the union's only inside contact with the electorate are generally regarded by other employees as the union's representatives, and their threats have corresponding impact.

Finally, the Ninth Circuit's decision permits a union to do indirectly what it cannot lawfully accomplish

directly. Through the use of in-plant organizing committees a union easily can shield its election victories from the effects of threats which, if made by the union itself, would require such victories to be set aside. See *Professional Research Inc., d/b/a Westside Hospital,* 218 N.L.R.B. 96 (1975). The decision thereby retards advancement of the Act's goal of according employees an unfettered choice in selection or rejection of collective bargaining representatives.

2. Whether Employee Threats of Deportation Should Be Attributable to the Petitioning Union Is a Question That Is Arising With Increasing Frequency and Thus Has Continuing Importance to the Administration of the National Labor Relations Act.

Within the past several years there has been a sharp upsurge in the number of illegal aliens entering the work force in this country. See generally Rochin, *Illegal Aliens in Agriculture: Some Theoretical Considerations,* 29 Lab. L. J. 149 (1978). This increase is most pronounced in border states like California, where the instant case arose, and Arizona, also in the Ninth Circuit, but is not confined to those areas.

This upsurge has brought an increase in the number of decisions under the Act concerning illegal aliens, and, in particular, a sharp increase in the number of cases considering the use of pre-election threats of deportation. Indeed, it is fair to say that pre-election threats of deportation have become a significant and recurring problem in the administration of the Act. See, e.g., *NLRB v. Sure-Tan, Inc.,* 583 F.2d 355 (7th Cir. 1978) (right of illegal aliens to vote in Board elections); *NLRB v. Heath Tec Division/San Francisco,* 566 F.2d 1367 (9th Cir.), *cert. denied,* 99 S. Ct. 110 (1978) (pre-election threats of deportation); *El Fenix Corp.,* 234 N.L.R.B. No. 186 (1978) (pre-election threats of deportation); *Information Magnetics Corp.,* 227 N.L.R.B. 1493 (1977) (pre-election threats of deportation); *Amay's Bakery & Noodle Co.,* 227 N.L.R.B. 214 (1976) (discriminatory discharge of illegal aliens); *Professional Research, Inc., d/b/a Westside Hospital,* 218 N.L.R.B. 96 (1975) (pre-election threats of deportation); *Lawrence Rigging, Inc.,* 202 N.L.R.B. 1094 (1973) (right of illegal aliens to vote in Board elections).

Threats of deportation pose considerable danger to the administration of free and fair elections. The threat is both easy to make and to carry out—an anonymous call to the Immigration and Naturalization Service is all that is required. Because the threat can be carried out so easily, it is a particularly potent and effective form of coercion.

Threats of deportation are a campaign tactic which must be carefully checked if Board elections are to truly reflect majority will. The need to safeguard against the use of such threats is now particularly acute, for it may be fairly anticipated in the context of a work force consisting of an increasing number of illegal aliens and a decline in union victories in Board elections, see *Forty-Third Annual Report of the National Labor Relations Board* 17 (1978), that union proponents will employ every available means, including threats of deportation, to attain their goal. The decision in the instant case, however, encourages rather than discourages the use of threats of deportation as a campaign tactic. Permitting this decision to stand

will impair free choice in a significant number of Board elections. The Court should grant certiorari to eliminate this threat to the proper administration of the Act.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the opinion of the Ninth Circuit.

Respectfully submitted,

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June 14, 1979.

APPENDIX A.

Statutes Involved.

1. National Labor Relations Act Sections 8(a)(1) and (5), as amended, 61 Stat. 140 (1947), 29 U.S.C. §§158(a)(1) and (5) (1976 ed.), provide:

   (a) It shall be an unfair labor practice for an employer—

   (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

   * * * *

   (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

2. National Labor Relations Act Sections 9(a) and (c)(1), as amended, 61 Stat. 143 (1947), 29 U.S.C. §§159(a) and (c)(1) (1976 ed.), provide in pertinent part:

   (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

   * * * *

   (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, ...

* * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

3. National Labor Relations Act Section 2(13), as amended, 61 Stat. 137 (1947), 29 U.S.C. §152 (13) (1976 ed.), provides:

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX B.

Opinion.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, v. Mike Yurosek & Sons, Inc., Respondent. No. 77-1775.

On Application for Enforcement of an Order of the National Labor Relations Board.

Filed: Jan. 22, 1979.

Before: MERRILL and KENNEDY, Circuit Judges, and BARTELS,* District Judge.

KENNEDY, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order holding a company in violation of sections 8(a)(1) & (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) & (5), for refusing to bargain with the union certified by the Board after the supervised election. The company, Mike Yurosek & Sons, Inc., refused to bargain because of alleged irregularities in the representation election. The Board held an evidentiary hearing to evaluate two objections made by the company and found that neither had merit. There is substantial evidence to support the Board's findings and we rule that the Board's order must be enforced.

The company operates in the central valley of California where it farms, processes, packs, and sells vegetables. The election in question was held to determine if the employees of the company's Lamont packing shed desired representation by the union, Butcher's Union Local 193 of the Amalgamated Cutters and

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*Honorable John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

Butcher Workmen of North America, AFL-CIO. The vote was 132 in favor of the union and 97 against.[1]

At its hearing, the Board considered company charges that two separate incidents during the pre-election campaign so tainted the election that the employees were denied free choice. The first and most substantial charge was that misrepresentations were made to the effect that if the employees did not vote in favor of the union, the Immigration and Naturalization Service would be informed of the names of any illegal aliens who were members of the employees' bargaining unit. There is little doubt that the subject of possible Immigration and Naturalization Service investigation was discussed by the employees during the election campaign, one of the occasions being in a group of 25 or 30 employees walking together to work. Beyond this, however, the contents of this and other rumors are confused and the evidence is in conflict as to who was repeating them. There was at least some evidence of a conflicting rumor, to the effect that an Immigration and Naturalization Service investigation would be avoided by defeating the union.

While there were creditable witnesses who testified that pro-union employees warned that immigration inspectors would appear if there were a union loss, at least two union members contradicted that claim and a member of the union organizing committee told employees that the rumors were unfounded. Finally, there was testimony that at least one union officer denied that the union had any intent to expose illegal aliens.

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[1]Challenges to twenty-eight ballots were not resolved because the outcome would remain unaffected.

The Board found that the union could not be charged with circulating the rumor. One factor in determining whether misrepresentations are likely to have had a significant effect on the outcome of an election is whether the statements in question were made or adopted by the union. If the statements are not properly attributed to the union, there generally is less likelihood that they affected the outcome. *NLRB v. Aaron Brothers Corp.*, 563 F.2d 409, 412 (9th Cir. 1977). This is simply an application of the general rule that "where the source of the questionable conduct is not the union or the employer . . . the Board and courts are especially hesitant to set aside an election." *NLRB v. Heath Tec Division*, 566 F.2d 1367, 1372 (9th Cir.), *cert. denied*, 47 U.S.L.W. 3222 (Oct. 2, 1978). Where some members of the bargaining unit are aliens, we do not find it surprising that rumors might circulate concerning potential government investigation of those whose lawful status in this country is open to some question. One function of elections is to permit information to circulate in a noncoercive setting, for examination and comment. Here there was some evidence that the union heard the rumor and clarified its position on the issue. Where a free election is rendered impossible by misrepresentation, threats or coercion, the election must be set aside. *Cross Baking Company v. NLRB*, 453 F.2d 1346, 1348 (1st Cir. 1971); *NLRB v. Urban Telephone Corporation*, 499 F.2d 239, 242 (7th Cir. 1974). While there were statements made by some of the employees which if attributable to the union would create an atmosphere sufficient to chill the freedom of their choice, there was insufficient evidence in this case to link those statements directly to the union or its agents. Although the administrative

law judge found otherwise, we conclude that the Board's determination is supported by substantial evidence and accordingly should not be set aside. *NLRB v. United Insurance Co. of America,* 390 U.S. 254, 260 (1968). The record does not establish, as a matter of law, that the freedom of choice of the employees was significantly impaired by the representations that were made.

The employer argues further that the election was tainted by statements made to the employees that the union initiation fee would be reduced if the employees signed authorization cards prior to the election. Testimony on this point, however, was in conflict and the Board was entitled to believe testimony of those witnesses, including the union president, who testified that the employees were specifically advised that any reduction in initiation fees would be available to all those signing an authorization card prior to execution of the collective bargaining agreement. That fee structure does not violate the Act. *NLRB v. Aaron Brothers Corp., supra* at 412-13; *see NLRB v. Savair Mfg. Co.,* 414 U.S. 270 (1973).

Accordingly, the petition for enforcement of the order is granted.

APPENDIX C.

Decision and Order.

227 NLRB 1936

United States of America, Before the National Labor Relations Board.

Mike Yurosek & Sons, Inc. and Butchers Union Local No. 193 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. Case 31-CA-6307.

Upon a charge filed on July 26, 1976, by Butchers Union Local No. 193 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, herein called the Union, and duly served on Mike Yurosek & Sons, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on August 10, 1976, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on June 24, 1976, following a Board election in Case 31-RC-3118 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing

[1]Official notice is taken of the record in the representation proceeding, Case 31-RC-3118, as the term "record" is defined

(This footnote is continued on next page)

on or about June 28, 1976, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On August 20, 1976, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On October 13, 1976, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. On October 22, 1976, the Union filed a joinder in Motion for Summary Judgment. Subsequently, on October 22, 1976, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause entitled "Employer's Opposition to Motion for Summary Judgment."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its opposition to the Motion for Summary Judgment, Respondent

in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

denies the validity of the Board's certification of the Union on the basis of its objections to the election in the underlying representation proceeding and the Board's resolution of those objections. Counsel for the General Counsel contends that Respondent is attempting here to relitigate issues which were raised and determined in the underlying representation proceeding and this it may not do. We agree with the General Counsel.

Review of the entire record, including that in Case 31-RC-3118, discloses that in an election conducted on May 21, 1975, pursuant to a Decision and Direction of Election,[2] the Union was successful by a vote of 132 to 97, with 28 ballots challenged. Respondent filed timely objections to conduct affecting the results of the election alleging in substance that (1) the Union threatened to notify the Immigration and Naturalization Service of the existence of employees illegally in the country, and (2) the Union told employees that the initiation fee would be $5 for those who signed authorization cards and $25 for nonsigners. After investigation, the Regional Director ordered a hearing on the substantial and material factual issues raised by the objections. After the hearing, the Hearing Officer, on September 11, 1975, issued a Hearing Officer's report and recommendations in which he recommended that Respondent's first objection be sustained, the second

[2]The Regional Director found, contrary to the Respondent, that the unit employees were not agricultural employees within the meaning of the Act. On May 6, 1975, the Regional Director denied Respondent's motion for rehearing and reconsideration, as supplemented. Thereafter, the Respondent filed with the Board a request for review which it withdrew on May 14, 1975.

overruled, and a new election be directed. Both Respondent and the Union filed exceptions to the Hearing Officer's report and supporting briefs, and Respondent filed a reply to the Union's exceptions.

The Regional Director, on October 24, 1975, issued a Supplemental Decision and Certification of Representative in which he overruled both objections and certified the Union. Respondent filed a request for review of the Regional Director's Supplemental Decision and Certification reiterating its objections and alleging that the Regional Director made clearly erroneous factual findings, departing from precedent, and that compelling reasons exist for reconsideration. By telegraphic order of December 10, 1975, the Respondent's request for review was granted as to the first objection, denied as to the second objection, and the certification stayed pending decision on review.

On June 24, 1976, the Board issued a Decision on Review[3] in which it affirmed the Regional Director's Supplemental Decision and Certification of Representative, as modified therein, and made certification of the Union effective as of the date of said Decision on Review. It thus appears that Respondent is attempting to relitigate matters already heard and determined by the Regional Director and the Board.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

[3]225 NLRB 148.

[4]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is a California corporation with an office and principal place of business in Lamont, California, where it is engaged in the farming, processing, packing, and sale of carrots, broccoli, turnips, rutabagas, parsnips, and red beets. Respondent annually sells goods or services valued in excess of $50,000 to customers or business enterprises within the State of California, which customers or business enterprises themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standard.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Butchers Union Local No. 193 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production workers, maintenance mechanics, and clean-up personnel employed by the Respondent at 6900 Mountain View Road, Lamont, California 93214, but excluding all other employees including drivers, office clerical employees, sales personnel, professional employees, guards and supervisors as defined in the Act.

2. The certification

On May 21, 1975, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on June 24, 1976, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about June 28, 1976, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 1, 1976, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit and on or about July 26, 1976, Respondent refused to bargain with the Union, by unilaterally and without prior notification to or bargaining with the Union, increasing the wages of the unit employees.

Accordingly, we find that the Respondent has, since July 1, 1976, and at all times thereafter, particularly July 26, 1976, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Mike Yurosek & Sons, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Butchers Union Local No. 193 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production workers, maintenance mechanics, and clean-up personnel employed by the Respondent at 6900 Mountain View Road, Lamont, California 93214, but excluding all other employees including drivers, office clerical employees, sales personnel, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 24, 1976, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 1, 1976, and at all times thereafter, and particularly on or about July 26, 1976, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Mike Yurosek & Sons, Inc., Lamont, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Butchers Union Local 193, of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production workers, maintenance mechanics, and clean-up personnel employed by the Respondent at 6900 Mountain View Road, Lamont, California 93214, but excluding all other employees including drivers, office clerical employees, sales personnel, professional employees, guards and supervisors as defined in the Act.

(b) Unilaterally changing wage rates or other terms and conditions of employment without notifying, consulting, or bargaining with the above-named Union as the exclusive bargaining representative of all the employees in the aforesaid appropriate unit, except that nothing herein contained shall be construed as requiring the Respondent to revoke any wage increases it has heretofore granted.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility at 6900 Mountain View Road, Lamont, California, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[5]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. January 31, 1977.

Betty Southard Murphy,
Chairman

John H. Fanning,
Member

John A. Penello,
Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

APPENDIX

Notice to Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Butchers Union Local No. 193 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT unilaterally change wage rates or other terms and conditions of employment without notifying, consulting, or bargaining with the above-named Union as the exclusive bargaining representative of all the employees in the aforesaid appropriate unit, except that nothing herein contained shall be construed as requiring the Company to revoke any wage increases it has heretofore granted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production workers, maintenance mechanics, and clean-up personnel employed by the Respondent at 6900 Mountain View Road, Lamont, California 93214, but excluding all other employees including drivers, office clerical employees, sales personnel, professional employees, guards and supervisors as defined in the Act.

MIKE YUROSEK & SONS,
INC.

APPENDIX D.

Decision on Review.

225 NLRB 148

United States of America, Before the National Labor Relations Board.

Mike Yurosek & Sons, Employer, and Butchers Union Local No. 193 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Petitioner. Case 31—RC—3118.

Pursuant to a Decision and Direction of Election issued April 22, 1975,[1] by the Regional Director for Region 31, an election was held on May 21 in the appropriate unit, comprised of production and maintenance employees at the Employer's Lamont, California, plant. The tally of ballots for the election showed that of approximately 283 eligible voters, 257 cast ballots, of which 132 were cast for the Petitioner, none were cast for the Intervenor, General Teamsters and Food Processing Union, Local No. 87, 97 were cast against the participating labor organizations, and 28 were challenged. The challenges were insufficient in number to affect the results. The Employer filed timely objections to conduct affecting the results. Because his investigation revealed conflicting evidence as to the conduct alleged in the Employer's objections, the Regional Director on July 10 ordered a hearing thereon. Pursuant thereto, a hearing was held before Hearing Officer Ronald J. Klepetar, and on September 11 he issued his report in which he recommended, based on his findings of fact and conclusions, that Objection 2 be overruled and that Objection 1 be

[1]Unless otherwise indicated, all events herein occurred in 1975.

sustained and a new election directed. The Employer and the Petitioner filed exceptions to his report.

On October 24, the Regional Director issued a Supplemental Decision and Certification of Representative, in which he adopted the recommendations as to Objection 2; however, disagreeing with the Hearing Officer, he overruled Objection 1 and certified the Petitioner as the representative of the employees in the unit, in accord with the results as shown by the tally of ballots. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's decision on the grounds that he made factual findings which are clearly erroneous, that he departed from precedent, and that compelling reasons exist for reconsideration of the policy or rule applied by him.

By telegraphic order dated December 10, the Employer's request for review was denied as to Objection 2 and granted as to Objection 1, and the certificatior issued by the Regional Director was stayed pending decision on review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review and makes the following findings:

Objection 1, as summarized by the Regional Director, alleges:

> During the pre-election critical period, employees were told by Petitioner's representatives that if the Petitioner were to lose the election, the Petitioner would notify the Immigration and Naturalization Service of the existence of employees who were employees of the Employer who were in this country illegally, thereby threatening to cause their deportation.

The Hearing Officer found, on the basis of the credited testimony of employees Alicia Lopez and Maria Terezon, that fellow employees Lupe Villalobos and Maria Papion, two of the six members of a voluntary in-plant organizing committee, and another unidentified person made threatening statements to eligible voters to the effect that if the Union did not win the election Immigration authorities would come and deport those Mexican aliens who were illegally in the country.[2] However, despite his finding that Villalobos and Papion were not acting as agents of the Petitioner, and that the threatening statements could not be attributed to it, the Hearing Officer noted that in *Professional Research, Inc., d/b/a Westside Hospital,* 218 NLRB No. 16 (1975), the Board found that a single threat of this character by a union organizer was sufficient to warrant setting aside an election. He therefore concluded that, given the ethnic makeup of the Employer's work force, combined with the fact that Immigration authorities had been to the plant several months earlier, the character of the conduct was so aggravated as

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[2]The Regional Director affirmed the Hearing Officer's credibility finding whereby he discredited the testimony of the Employer's main witness, Linda Rivera, and the Employer did not request review of that credibility resolution. The Hearing Officer also referred to certain testimony of Petitioner's witnesses, and he noted that none of the four individuals named in the testimony of Rivera, as making threatening statements of the same character as above discussed, were called to testify.

to create an atmosphere of fear and reprisal rendering a free expression of choice of representative impossible.

The Regional Director disagreed with the Hearing Officer's conclusion. Referring to testimony that other in-plant organizing committee members had said that the Union would not get rid of anybody, and that an International representative of the Union had stated, at a well-attended organizational meeting, that it did not matter if employees were illegal, and viewing such statements as disavowals of the aforementioned threats which tended to neutralize any atmosphere of fear that otherwise might have been engendered by the third party conduct, the Regional Director overruled the objection.

The Employer contends that the threats found to have been made should be attributed to the Petitioner and the record does not support the Regional Director's conclusion that the threats were disavowed by the Petitioner, i.e., the record is unclear as to the time of the meeting at which Union Official Fougeron made the alleged disavowal, as to whether the meeting was "well-attended," and as to whether he was addressing himself to threats being made to call Immigration or to questions raised concerning the treatment the Union would give aliens if it was certified. The Employer argues, therefore, that the objection should be sustained and the election set aside on the basis of *Westside Hospital, supra.*

According to the credited testimony of Lopez, in-plant committee members Villalobos and Papion made threatening remarks while engaged in production operations with about 10 other employees on either side of a belt, approximately 2 weeks before the election.

She testified that Villalobos said on this occasion "it would be better to vote for the Union, otherwise Immigration would come to work or their home"; and that Papion said "vote for the Union, otherwise Immigration will take all of you." Maria Terezon's credited testimony was that she "had heard talk that if the Union did not win the following day the Immigration would come in and take the people"; that she heard this "before, during and after the election"; that, specifically, she heard it said the day of the election by an unidentified individual who was in front of her in a line of around 70 employees who were walking to work.

Review of the record also reveals the following testimony by witnesses called by the Petitioner:

Herrera, an in-plant committee member, testified she had attended "quite a few" union meetings, and when asked if "anybody at the meeting you attended asked anybody from the Union about Immigration problems," she said "yes," and named Gus Fougeron as the union official. His response, she stated was: "that it did not matter if they were illegal or whether you were black or blue or what. It did not matter if they belonged to the Union. They wanted them, they did not want to get rid of them." She stated Fougeron said this in English to a group of 15 to 20 workers who could speak English and his words were not translated into Spanish, and she added "we told some of the Mexican workers" in Spanish.

Mary Jacuende, a union member employed by another company who acted as a translator for the Union, stated that at one of the three or four meetings she attended, no union officer being present, she recalled being asked by employees what would happen with

illegal aliens if the Union got in, and she told them "we were not Immigration officers. We did not care where the people come from or who they were. . . ." She told them generally if they doubted her answers and wanted more information they could call the union office.

Lucy Ruiz, a union member working for the same company as Jacuende and a member of the Union's executive board, who also acted as a translator for the Union, testified that she talked with employees individually apparently at the same meeting Jacuende spoke of, that she was asked the same kind of questions by three or four employees, and she gave answers in the same vein as Jacuende's.

Alicia Roche, a dischargee who has filed an 8(a)(3) unfair labor practice charge, was a member of the organizing committee who also acted as a translator at meetings. She testified she was never asked about the Union's position on the Immigration matter, and when asked how *she* felt about it, she responded: as to whether they would be hurt or investigated, that she did not know; and as to whether they were entitled to the same thing as others, that they were. She also testified that some of the girls wanted to turn illegal aliens in, but she opposed them, saying "No—we need those votes." She answered in the negative when asked if she had heard union officers say anything about Immigration people, adding: "the only thing they said . . . is: Everybody is equal." And she named two officers who said that at more than one meeting.

Finally, Magdelena Gomez, a member of the organizing committee, testified that she heard "rumors about

people being scared that if the Union came in, the Immigration would come in, or if it did not come in, the Immigration would come in"; and that her response would be to get a little upset and tell them the Union's purpose was not to get rid of anybody or call Immigration.

Our review of the record discloses no evidence that officials of the Petitioner made any threats to employees of the type found to have been made by Villalobos and Papion or in any way led employees to believe that they ratified or acquiesced in such threatening statements. Contrary to the Employer's contention, the fact that employees served as members of the in-plant organizing committee or as election observers does not, in the circumstances of this case, constitute them as Petitioner's agents in the making of threatening statements to fellow employees, and we affirm the Hearing Officer's finding that the mere fact that some members of the organizing committee may have engaged in such conduct, without more, is insufficient to establish agency.[3] As noted by the Hearing Officer, conduct engaged in by third persons tends to have less effect upon voters than similar conduct of one of the parties.[4] Evaluating the impact of these threats made by Villalobos, Papion, and an unidentified person in the light of the entire record, including the evidence that in the recent past Immigration authorities had been at the Employer's plant checking on employees who were

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[3] *Owens-Corning Fiberglas Corporation*, 179 NLRB 219, 223 (1969); *Cross Baking Company, Inc.*, 191 NLRB 27 (1971), reversed on other grounds 453 F.2d 1346 (C.A. 1, 1971). The Employer's request that the Board reconsider the policy or holdings of those decisions is hereby denied.

[4] *Owens-Corning, supra;* see also *Orleans Manufacturing Company*, 120 NLRB 630, 633 (1958).

Mexican aliens and that rumors were afloat that the Immigration authorities would be called if the Petitioner lost—or, according to some testimony, even if it won—we conclude that the conduct herein was not so aggravated in character as to destroy the atmosphere for the expression of employee free choice in the election.[5]

While the record evidence is too ambiguous to support the Regional Director's conclusion that the Union disavowed the threats made herein, we note from the testimony of others who assisted in the organizational campaign that substantial efforts were made by them to disabuse employees of the idea that the Union would call the Immigration authorities if it lost the election. To this extent, the impact of the threats and rumors was lessened. In any event, we believe illegal aliens naturally experience some fear of detection and deportation as a consequence of their unauthorized presence in the U.S., and we doubt that the threats and rumors herein, considering their source, so exacerbated these fears as to render any illegal alien employees incapable of exercising a free choice in the election. For these reasons, Objection 1 is overruled.

Accordingly, the Regional Director's Supplemental Decision and Certification of Representative, as modified herein, is hereby affirmed, except that the effective

[5]The *Westside Hospital* case, relied on by the Hearing Officer and the Employer, is factually distinguishable, as there the spokesman for a group of Spanish-speaking employees was threatened with deportation by a staff representative of the union unless he sided with the union in the election, and the spokesman related this threat to his wife and some of his Spanish-speaking workers. The Board found this conduct to have a coercive effect on employee free choice in the election. Clearly, that case did not deal with third-person conduct.

date of the certification shall be the date of this Decision on Review.

Dated, Washington, D.C. June 24, 1976.

Betty Southard Murphy,
Chairman

John H. Fanning,
Member

John A. Penello,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX E.

Order.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, v. Mike Yurosek & Sons, Inc., Respondent. No. 77-1775.

Before: MERRILL and KENNEDY, Circuit Judges, and BARTELS,* District Judge.

Filed: May 3, 1979.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Kennedy has voted to reject the suggestion for a rehearing en banc, and Judges Merrill and Bartels have recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

APPENDIX F.

Order Staying Issuance of Mandate.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, and Butcher's Union, Local 193, Intervenor, vs. Mike Yurosek & Sons, Inc., Respondent. No. 77-1775, NLRB #31CA-6307.

Filed: May 25, 1979.

Upon application of Robert J. Kane, Esq. counsel for the Respondent, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Respondent herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before June 14, 1979.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Anthony M. Kennedy
United States Circuit Judge.
Hon. Anthony M. Kennedy, CJ

DATED: SAN FRANCISCO, CALIF.